FILE COPY

IN THE

Supreme Court of the United States

OCTOBER TERM, 1934.

No. 869.

UNITED STATES OF AMERICA,

Petitioner,

vs.

ATLANTIC MUTUAL INSURANCE COMPANY,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CLAIMS.

J. M. RICHARDSON LYETH,
Counsel for Respondent.

THE COURT PRESS, N. Y. C.

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Statement.

The general average loss occurred on the Army Transport "Logan" in December, 1918, on a voyage from San Francisco to Manila (p. 3). The Judge Advocate General ruled that general average was properly payable, and the War Department agreed with this decision and wrote on May 6, 1920, that it would bear its share of any general average adjustment (p. 5). The War Department thereupon employed Johnson & Higgins, well known average adjusters, to prepare a general average statement, which was not completed and issued until December, 1926, (p. 3). The amount payable to the respondent as shown by the general average statement was approved by the War Department, and vouchers were prepared and sent to the General Accounting Office for

approval; but in May, 1928, Comptroller General McCarl denied all liability on the ground that "the vessel and all cargo aboard were property of the United States. Therefore, the claimants, as insurers of the cargo consigned to the Philippine Islands Government and the Manila Railroad, are not entitled to contribution in general average, which would be equivalent to the United States paying for the loss of property on which it had carried insurance against such loss" (pp. 5-6).

The owners of the cargo on board the "Logan" were, in addition to the War Department, the American Red Cross, the Philippine Islands Government, the Manila Railroad Company, (a stock corporation incorporated in the State of Maine) and two Army officers. It is thus apparent that not only was the Comptroller General obviously in error in the facts upon which he predicated his denial of the claim, but he also confused the separate legal entities above named.

This suit was instituted in the Court of Claims promptly after the denial of the claim by the Comptroller General. He refused even to permit the Attorney General to stipulate facts which were not in dispute, and put the respondent to great expense and labor in taking testimony in San Francisco, New York and in England.

The general average sacrifice occurred while the Army Transport "Logan" was carrying miscellaneous merchandise and supplies for the Manila Railroad Company, Philippine Islands Government and the American Red Cross from San Francisco to Manila in the month of December, 1918. As a result of the war emergency, merchant ships regularly operating in the Pacific trade were transferred to the Atlantic Ocean and Army transports were carrying

all sorts of miscellaneous supplies to the Philippines. The supplies shipped on this voyage consisted of miscellaneous office stationery, equipment, books, etc. (pp. 7 and 8).

Argument.

1. This case arose out of unusual circumstances which are not likely to be repeated. The Army transports, owing to the war emergency, were actually carrying freight for parties other than the War Department or the Government of the United States. The situation is so far out of the ordinary that it does not present questions of general public interest.

2. There can be no serious question that the United States, as owner of an Army transport, is liable to contribute in general average where it is transporting freight for other parties. It is well settled that Government property contributes in general average. *The Davis,* 10 Wall. 15; *United States* v. *Wilder,* 28 Fed. Cases No. 16,694; *Brown* v. *United States,* 15 Ct. of Claims 392; Arnould Marine Insurance 11th Ed. Vol. II., Sec. 973; Phillips Insurance, Vol. II., Sec. 1345.

The transport was in fact substituting for the regular commercial carriers on the Pacific and was carrying non-military goods for a number of shippers. The fact that no freight was paid or payable does not affect the obligations in general average. The fact that freight was not payable was the basis of the holding of the Court of Claims that there was no general average in the previous case brought by Johnson & Higgins for their fee in preparing the general average statement. That argument has not been urged by the Government in this case, and the Court of Claims reversed its former decision.

If the general average sacrifice had happened to fall on the hull of the "Logan" instead of on her cargo, there would have been no question but that the cargo should contribute in general average. Obligations in general average obviously are mutual.

3. There is no conflict between the decision of the Court of Claims in this case and the decision of the Circuit Court of Appeals for the Second Circuit in *Det Forenede Dampskibs Selskab* v. *Insurance Company of North America,* 31 Fed. (2d) 658. That case was not concerned with the statute of limitations or with laches, its equivalent in Admiralty. The sole question was the date which should govern the rate of exchange for converting Danish kroner into dollars. In fact, in his opinion, Judge Learned Hand expressly distinguished the earlier case of *The Allianca,* 64 Fed. 871, affd., 79 Fed. 989, on the ground that the latter case involved a question of laches. Judge Hand's opinion is chiefly concerned with the question whether a cause of action could have been maintained by the vessel owner against the cargo for general average contribution prior to the time when the general average statement was prepared, and he held that delivery of the goods to the consignee implied an agreement on the part of the consignee to pay the general average contribution.

The present case is a suit by the cargo owner against the vessel owner, and the situation is entirely different in that no further act remains to be done by the cargo owner after the merchandise is delivered to him before the payment of general average contribution; whereas the vessel owner is charged with substantial duties to be performed as follows:

(a) The vessel owner must obtain a deposit of cash or sufficient security to cover possible contribu-

tions in general average owing by the respective shipments of cargo before delivering them.

(b) The owner must prepare, or cause to be prepared, a general average statement.

(c) The vessel owner must either himself, or through his agent the average adjuster, collect the net amounts payable by the debtor interests in general average and disburse such collections to the creditor interests.

Judge Addison Brown held in *The Allianca, supra,* which was affirmed by the Circuit Court of Appeals for the 2d Circuit, that laches did not begin to run in an action by the cargo owner against the vessel owner until the general average statement had been issued.

In view of the fact that Judge Hand expressly distinguished *The Allianca,* the latter case must be regarded as the law of the Second Circuit, and it is in entire harmony with the decision of the Court of Claims below.

The situation respecting the statute of limitations is analogous to cases in anticipatory breach of contract, where the injured party may either bring suit immediately upon the first breach (*i. e.,* upon arrival of the goods at destination in case of general average), or may treat the contract as continuing and wait until the time has elapsed for complete performance (*i. e.,* until the issuance of the general average statement prepared by the vessel owner). *Foss-Schneider Brewing Co.* v. *Bullock,* 59 Fed. 83 (CCA 6—1893); *Cleveland Rolling Mill* v. *Rhodes,* 121 U. S. 255; *Roehm* v. *Horst,* 178 U. S. 1. Likewise, where there are successive acts to be performed under a contract, the statute of limitations does not commence to run until the date of the last breach. *Wold* v. *Wold,*

138 Minn. 409; *Heery* v. *Read*, 80 Kas. 380; *Harris* v. *Townsend*, 101 Miss. 590.

4. The Government complains that the amount of its liability was erroneously computed because it included interest and a portion of the amount of general average owing from owners of cargo which the master had failed to collect or to secure. The judgment was only for the amount of general average shown to be due to the respondent in the statement prepared by Johnson & Higgins, the average adjusters employed and paid by the Government itself; no interest was added to this amount. It is also settled beyond question that the vessel owner must make good general average contributions due from cargo which the master delivered without taking proper deposit or security. *The Santa Ana*, 154 Fed. 800; *Heye* v. *North German Lloyd*, 33 Fed. 60; *The Ernestina*, 259 Fed. 772; *Carver, Carriage of Goods by Sea*, Sec. 442.

The Government also raises the question whether an underwriter may recover more than it has paid to its insured. The respondent's claim arises by subrogation and it is fundamental that the underwriter may enforce the claim of its assured; and it is no defense to a third party that the recovery may exceed the amount paid by the underwriter to the assured. *Mobile & Montgomery Ry. Co.* v. *Jurey*, 111 U. S. 584; *The Propeller Monticello* v. *Mollison*, 17 How. 152; *City of Bangor*, 60 Fed. (2nd) 90.

The decision below is not in conflict with the decision of the Circuit Court of Appeals, 2d Circuit, in *Det Forenede Dampskibs Selskab* v. *Insurance Company of North America, supra*, but is in harmony with the law of that Circuit and with the general

body of the law. The entire litigation has been rendered necessary at great expense, labor and delay to the respondent solely because of a ruling by the Comptroller General which was based on erroneous facts and upon a palpably erroneous view of the rules of law applicable. The case arose out of an unusual situation which is not likely to be repeated, and is without general significance.

WHEREFORE it is respectfully submitted that this petition should be denied.

J. M. RICHARDSON LYETH,
Counsel for Respondent.

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UNITED STATES OF AMERICA,

Petitioner,

v.

ATLANTIC MUTUAL INSURANCE COMPANY,

Respondent.

ON A WRIT OF CERTIORARI TO THE COURT OF CLAIMS.

BRIEF FOR THE RESPONDENT ATLANTIC MUTUAL INSURANCE COMPANY.

J. M. RICHARDSON LYETH,
Attorney for Respondent.

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ON A WRIT OF CERTIORARI TO THE COURT OF CLAIMS.

BRIEF FOR THE RESPONDENT.

Opinion Below.

The opinion of the Court of Claims (R. 12-20) is reported in 1934 A. M. C. 1563.

Jurisdiction.

The jurisdiction of this Court rests upon Section 3 (b) of the Act of February 13, 1925.

Statute Involved.

Act of March 3, 1911, Chap. 231, Sec. 156 (Section 156 of the Judicial Code) 36 Stat. 1139:

> "Every claim against the United States cognizable by the Court of Claims shall be forever barred unless the petition setting forth a statement thereof is filed in the Court * * * within six years after the claim first accrues" * * *.

Statement.

This case comes up on writ of certiorari to the Court of Claims to review a judgment in favor of the respondent for $48,099.40 entered November 5, 1934.

The transport *Logan*, owned by the United States and operated by the War Department, sailed from San Francisco on December 5, 1918, bound for Vladivostok and the Philippine Islands (R. 8). In addition to United States Government supplies, she had on board shipments of miscellaneous supplies (principally stationery, books and medical supplies) owned by the American Red Cross, the Government of the Philippine Islands and Manila Railroad Company (R. 8, 9).

The carriage of these shipments for the Red Cross, the Government of the Philippine Islands and the Manila Railroad Company was arranged as a result of the war emergency, which had necessitated the transfer of ships regularly operating in the commercial service in the Pacific to the Atlantic (R. 8).

The shipments owned by the Government of the Philippine Islands and the Manila Railroad Company were insured by the respondent against marine risks, including fire, and are involved in this case (R. 8). No bill of lading was issued covering either of these shipments, nor was any freight paid or agreed to be paid (R. 8).

On the 16th of December, 1918, while the vessel was in the Pacific Ocean some seven hundred miles northwest of Hawaii, fire broke out in No. 1 lower hold. The Captain ordered that water and steam should be pumped into the hold in order to extinguish the fire and prevent the total loss of the vessel and her cargo. Fire broke out again on December 22, 1918, while the vessel was still at sea, and more water was poured into the hold. The fires were thereby

extinguished, but the water badly damaged the shipments belonging to the Government of the Philippine Islands and the Manila Railroad Company (R. 9).

The *Logan* arrived at Vladivostok January 14, 1919, and there discharged part of her cargo. She arrived at Manila January 19, 1919, where the remainder of her cargo was discharged. At both ports, the master permitted the cargo to be unloaded and delivered to owners and consignees without requiring and obtaining from them any bond or bonds to secure payment on general average (R. 9).

Prior to the sailing of the transport *Logan* from San Francisco, respondent had written insurance against marine risks, including fire, upon the shipments owned by the Government of the Philippine Islands and by the Manila Railroad Company. After the arrival of the transport at Manila, the claims were presented by the assured and respondent paid the losses in full in the total amount of $38,997.02 (R. 10).

On May 6, 1920, the Chief of the Transport Service of the War Department wrote to the Chief of the Bureau of Insular Affairs that the War Department would bear its share of any general average payable to cargo on the transport *Logan* (R. 10). On March 15, 1921, respondent presented to the petitioner claim and demand for payment of the general average contribution owing to cargo insured by respondent. Hearings were held by a board of inquiry of the War Department, which denied the claim. The claim was thereafter reviewed by the Judge Advocate General, who reversed the decision of the board of inquiry and held that general average was properly payable to the respondent (R. 10).

In August, 1922, the War Department employed Johnson & Higgins of California, average adjusters,